consideration of the fact that a mother is in a better position to bring up a child is different from the case of a female infant. In any event it is not the immediate readjustment that must necessarily have to take place but in our view throughout the entire period until that child becomes capable of looking after himself, in other words becomes an adult, that ought to be considered.

Having regard to all these considerations we will make an order granting custody of this child of the marriage to the appellant, the petitioner in the divorce proceedings with liberty to apply and also order that if and when the respondent abides by this order and hands over the custody of the child to the husband the petitioner that she should have reasonable access and if the parties cannot agree as to the terms of access there will be liberty to apply to the Registrar in relation to that order.

As the appellant is not seeking costs, there will be no order as to costs and the deposit to be paid out to the appellant's solicitors.

Order accordingly.

Solicitors: *Drew & Napier; Hangchi, Lee & Woo.*

MALAYSIAN REPORTS

YEAP YOK TEE v. LEE BOON BEE

[A.C.J. (Ibrahim J.) March 4, 1972]

[Kota Bharu — Civil Appeal No. 22 of 1971]

Land Laws — House built on land — Whether part of the land — Tenancy — Registered interest subject to tenancy — National Land Code, ss. 5 and 213(5).

This was an appeal against the decision of the learned president who had dismissed the appellant's claim for vacant possession of certain premises. The facts were that the land had been transferred to the appellant. A house had been built on the land and this was occupied by the respondent who had been paying rent for the said premises.

Held: (1) the house formed part of the land on which it stood and was therefore the property of the appellant,

(2) the appellant's registered interest in the land was subject to the tenancy and as the respondent was a lawful tenant of the house the appellant could not succeed in her claim.

Cases referred to:-

(1) *Chua Sai Ngoh* v. *Beh Ai Meng* [1955] M.L.J. 167.

(2) *Haji Mohamed Dom* v. *Sakiman* [1956] M.L.J. 45.

(3) *Bajaj Textiles Ltd.* v. *Gian Singh & Co. Ltd.* [1971] 2 M.L.J. 133.

(4) *Eusop Ali and another* v. *Nyonya Lee Gaik Hooi* [1953] M.L.J. 98.

(5) *Devi* v. *Francis* [1969] 2 M.L.J. 169.

CIVIL APPEAL.

H. L. Wrigglesworth for the appellant.

A. Wilson for the respondent.

Ibrahim J.: This is an appeal against the decision of the learned president who dismissed with costs the appellant/plaintiff's claim for vacant possession of premises No. 17 Jalan Pauh, Tanah Merah, and damages for alleged unlawful occupation thereof.

The material facts were not in dispute. The land on which the said premises stood was a Malay Reservation land and at one time belonged to Koh Geok Chin who agreed to sell it to Fong Yew Chit and on the strength of that agreement Fong Yew Chit built the said premises. The approval of His Highness the Ruler in Council was however not obtained and as a result of that Koh Geok Chin allowed Fong Yew Chit to keep the said premises on the land on payment of ground rent of $60 per annum. Fong Yew Chit subsequently gave the said premises to his son Fong Eng Leong (DW2) who continued to pay the ground rents to the original and subsequent owners of the land. The land was transferred to various persons and on 2nd September 1969 it was transferred from Ong Hau Tong to the appellant/plaintiff. Before that Ong Hau Tong and the appellant/plaintiff had on 2nd November 1965 entered into an agreement (P2) by which Ong Hau Tong agreed to transfer the land to the appellant/plaintiff. The appellant/plaintiff admitted that she knew that when P2 was made the said premises did not belong to Ong Hau Tong and that the price of $7,000 was only for the land and did not include the said premises. She also admitted that the respondent/defendant was paying rent for the said premises to DW2 which was at $50 p.m. On the execution of P2 the

appellant/plaintiff had increased the ground rent to $120 per annum (or $10 p.m.) which the respondent/defendant apparently on behalf of DW2 paid to her till she became the registered owner of the land on 2nd September 1969 when she refused to accept further ground rents. The said premises had cement floor with some of the pillars buried into the ground.

In the record of appeal it was noted (at page 4) that the issue was "Who is the owner of premises?" and the learned president in his grounds of judgment said: —

"I was of the view that the plaintiff was only the landowner and not the house owner as well. The previous land owner had been receiving ground rent for the house owner which only showed, coupled with the plaintiff's admission that when she bought the land that she was only buying the land (P2), that the house was not part and parcel of the land. As purchaser of the land, she could not get an interest more than what the previous land owner had."

It was contended by counsel for the appellant/plaintiff that the learned president was wrong in finding that the appellant/plaintiff was only the land owner and not the house owner as well and referred to the definition of 'land' in section 5 of the National Land Code and among other cases *Chua Sai Ngoh* v. *Beh Ai Meng*[1] in support of his contention.

Under the said section 5 of the National Land Code land includes:

"(d) all things attached to the earth or permanently fastened to any thing attached to the earth, whether on or below the surface;"

The head-note in *Chua Sai Ngoh's* case reads as follows: —

"This was a claim by the plaintiff for a declaration that she was the lawful owner of certain houses built on land belonging to her and for possession of the said houses. The houses were plank-walled houses built on concrete platforms and were built by the defendant before the purchase of the land by the plaintiff. The defendant had been paying rent to the plaintiff at the end of each year for his occupation of the land. In 1953 the plaintiff had a quarrel of some sort with the defendant, and subsequently she wrote a letter to the defendant purporting to give him a month's notice to quit the premises.

The defendant contended that the plaintiff was only the owner of the land but not of the houses. The plaintiff alleged that the defendant's conduct amounted to disclaimer of her title and therefore no notice to quit was required."

and it was *held* that

"the houses in question were part of the land on which they stood and were thus the property of the proprietor of the land, the plaintiff."

There is also an editorial note which reads as follows:

"at the conclusion of the judgment, which is not reproduced in this report, His Lordship dealt with the questions of orders for ejectment and possession, and decided that she could not succeed because in this case by claiming to be the owner of the houses the defendant had not repudiated the relationship of landlord and tenant, and that it was not a sufficient disclaimer which could justify his ejectment without notice, and that as it was an annual tenancy it could only be determined by giving half a year's notice to quit."

It would therefore appear that by the nature of the said premises, the definition of land in the said section 5 of the National Land Code and the decision in *Chua Sai Ngoh's* case the said premises formed part of the land on which it stood and was therefore the property of the appellant/plaintiff and it is on the assumption that the learned president was wrong in finding that the appellant/plaintiff was not the owner of the said premises but on some other issue that I propose to dispose of this appeal.

Counsel for the appellant/plaintiff objected to any issue other than the one which had been agreed upon at the hearing before the learned president being raised in this appeal and in support of his objection referred the court to various authorities one of which was *Haji Mohamed Dom* v. *Sakiman*[2] where Mathew C.J. in the course of his judgment at page 45 said:

"Nowhere in the pleadings is it alleged that the agreement was in the nature of a document of loan, and the case never proceeded on that basis. In my view, once he had found that the agreement for sale was a genuine document, the learned trial judge had no alternative but to order specific performance of the agreement or to award damages. I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record, which in this case they were not, *Blay* v. *Pollard & Morris* [1930] 1 K.B. 628 (at page 634)."

All the cases referred to by him, however, deal with absence of pleadings on matters sought to be raised on appeal which is not the case in this appeal for paragraphs 2-4 of the statement of defence read as follows: —

"2. The defendant avers that at all material times the owner of premises known as No. 17 Jalan Pauh, Tanah Merah, Kelantan is Fong Eng Leong of 271A Jalan Temenggong, Kota Bharu.

3. The defendant further avers that he is the lawful tenant of the said Fong Eng Leong in respect of the said premises and is therefore not in unlawful occupation of the said premises.

4. The defendant avers that the plaintiff has no cause of action against the defendant."

It may be argued that the same principle would by analogy apply to appeals such as this one where though matters had been pleaded they had been left out of the agreed issues. This may be true as a general proposition but I do not agree that it would apply in this particular appeal. The record of appeal also shows (at pages 9 and 10) that submissions were made on the effect of the various relevant provisions of the National Land Code and an appellate court has a discretion to hear any such matter in cases where its decision would be based on the evidence before it which could not have been rebutted by the party adversely affected and no miscarriage of justice would be occasioned thereby. In *Bajaj Textiles Ltd.* v. *Gian Singh & Co. Ltd.*[3] Lord Pearson delivering the judgment of the Board at page 136 said:

"Thus it appears that both the learned judge and the Federal Court had in mind the state of the pleadings, and the Federal Court at any rate had specifically in mind the lack of an express allegation by the defendants of part payments on account of the outstanding balance. In proceeding to decide on the facts of the case notwithstanding the defect in the defendants' pleading, that the plea of limitation was defeated by such part payments they were exercising a discretion. In all the circumstances their exercise of the discretion seems reasonable. At any rate their Lordships are not persuaded that the discretion was not judicially exercised or that there was any miscarriage of justice."

I would at this stage say that if the only issue before the learned president was the question of ownership of the said premises the learned president should not have gone on to hear the case in view of the fact

that DW2 who was alleged by the respondent/defendant to be the owner of the said premises was not made a party to the suit and would not therefore be bound by any decision made on that issue. That was why I said earlier that I would dispose of this appeal on the assumption that the learned president's finding on that issue was wrong.

It is clear from the facts in this appeal that a yearly tenancy existed between the appellant/plaintiff (and her predecessors-in-title) and DW2 in respect of the said premises which might have become monthly when the increased ground rent was paid and received on monthly basis and that DW2 who was collecting monthly rents of $50 from the respondent/defendant was in possession of the said premises at all material times. As such it was submitted by counsel for the respondent/defendant that even if the learned president's finding as to the ownership of the said premises was wrong his decision to dismiss the claim was correct by virtue of certain provisions of the National Land Code and the Kelantan Land Enactment which it replaced.

In the course of his judgment in *Chua Sai Ngoh's* case Thomson J. (as he then was) at page 168 said: —

"When the plaintiff become the registered proprietor of the land she acquired an indefeasible title to the whole right, title and interest in it subject to any registered interests (of which there were none) and subject to such unregistered interests as are protected by section 42(v) of the Land Code. By definition (section 2) 'land' includes things attached to the earth or permanently fastened to any thing attached to the earth. The question here, therefore, is whether the houses in question are attached to the earth."

and towards the end of his reported judgment he said at page 169: —

"It follows, then, that the houses in question are part of the land on which they stand and are thus the property of the proprietor of the land, that is to say, of the plaintiff and for what it is worth she must therefore have the declaration to that effect for which she asks."

The judgment had not been reported in full but the editorial note and the passages from the judgment quoted above would tend to show that his Lordship might have considered the effect of the said section 42(v) of the F.M.S. Land Code when his Lordship decided that the plaintiff could not succeed in getting orders for ejectment and possession of the premises in question.

The said section 42(v) of the F.M.S. Land Code reads as follows: —

"42(v) When at the time the proprietor becomes registered a tenant shall be in possession of the land under an unregistered lease or agreement for a lease or for letting for a term not exceeding one year the title of the tenant under such lease or agreement shall prevail."

The words in the said section 42(v) were identical with those in section 37(v) of the Kelantan Land Enactment and section 43(5) of the Kedah Land Enactment and in *Eusof Ali & Anor.* v. *Nyonya Lee Gaik Hooi*[4] where it was held that the assignment of a parole monthly tenancy was valid to transfer the benefit of the monthly tenancy Briggs J. at page 99 said: —

"I find this question much more difficult than it appears at first sight. Every tenancy may be considered from two aspects, which I may call the proprietory and the contractual. In Kedah a person 'in possession of land under an unregistered lease or agreement' (which may be written or parole) 'for letting for a period not exceeding one year' has a 'title'. Land Enactment section 43(5). The nature of the title is not specified, but the word cannot possibly connote a merely contractual interest. *Prima facie* a proprietory interest, however small in extent, should, one would think, be assignable."

DW2 therefore had a "title" under the said section 37(v) of the Kelantan Land Enactment which prevailed over that of the registered land owner up to the time when the said Kelantan Land Enactment ceased to be in force. The appellant/plaintiff however became the registered owner of the land after the Kelantan Land Enactment had been replaced by the National Code on 1st January 1966 but by virtue of sections 213 and 215 of the said National Land Code DW2's tenancy would continue to be safeguarded. The relevant parts of the said sections 213 and 215 read as follows: —

"213.(1) In this Act 'tenancy exempt from registration' means —

....

(b) any tenancy or sub-tenancy for a term not exceeding one year granted pursuant to the provisions of any previous land law."

"215.(3) The transferee of any alienated land shall hold the same subject to —

....

(b) ...any tenancy exempt from registration granted by the transferor or any predecessor in title;"

As the appellant/plaintiff's registered interest in the land was subject to DW2's tenancy and as the respondent/defendant was a lawful tenant (or sub-tenant) of DW2 the appellant/plaintiff could not succeed in her claim and I would therefore dismiss her appeal with costs.

Counsel for the respondent/defendant had also raised the issue of irrevocable licence based on *Devi* v. *Francis*[5] which was referred to in the submission made by the then counsel for the respondent/defendant at the hearing before the learned president but in view of my decision on the other issue on which I had disposed of this appeal it is unnecessary for me to go into it.

Appeal dismissed.

Solicitors: *Wrigglesworth & Co.; Wilson & Co.*